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285-483—67——1

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 791

MORTON SOBELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States District Court for the Southern District of New York is reported at 264 F. Supp. 579 (Pet. App. 1a). The *per curiam* opinion of the court of appeals is reported at 378 F. 2d 674 (Pet. App. 47a).

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1967. On September 14, 1967, the time for filing a petition for a writ of certiorari was extended to November 6, 1967, by order of Mr. Justice Harlan, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's motion under 28 U.S.C. 2255 to vacate his sentence for conspiracy to commit espionage should have been denied on the ground that it raises issues that were or should have been raised at earlier stages of the case.

2. Whether the district court properly determined that the records and files of the case establish that petitioner's allegations of fraud and perjury are unfounded.

STATUTE INVOLVED

Section 2255 of the Judicial Code, as amended, 28 U.S.C. 2255, is set forth in the petition at pp. 4–5.

STATEMENT

On March 29, 1951, petitioner and two co-defendants, Julius and Ethel Rosenberg, were found guilty, after trial by a jury, of conspiracy to commit espionage, in violation of former 50 U.S.C. 32 and 34 (now 18 U.S.C. 794). On April 5, 1951, petitioner was sentenced to thirty years imprisonment. His conviction was thereafter affirmed by the court of appeals, *United States* v. *Rosenberg,* 195 F. 2d 583, and this Court denied certiorari, 344 U.S. 838, and rehearing, 355 U.S. 860.[1]

[1] A general summary of the evidence adduced at trial is contained in the court of appeals' opinion affirming the convictions, at 195 F. 2d 588–590. The evidence adduced against petitioner is set forth in our briefs concerning petitioner's previous post-trial motions, see Brief for the United States in Opposition, Nos. 440 and 441, O.T. 1957, pp. 6–10.

The present motion is one in a series of collateral attacks which petitioner has made on his conviction.[2] Petitioner alleges broadly that the government knowingly "created, contrived and used false, perjurious testimony and evidence and intentionally and wilfully induced and allowed government witnesses to give false, misleadig and deceptive testimony in order to obtain the conviction of petitioner and his co-defendants" (A. 211a–212a).[3]

ARGUMENT

PETITIONER'S PRESENT APPLICATION FOR RELIEF PURSUANT TO SECTION 2255—HIS SIXTH SUCH MOTION—CONSTITUTES AN ABUSE OF THE STATUTE

Section 2255 provides in relevant part that the "court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." We recognize that, under the principles enunciated by this Court in *Sanders* v. *United States*, 373 U.S. 1, the fact that this is petitioner's sixth motion under 2255 is not in itself a bar to the consider-

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[2] *United States* v. *Rosenberg*, 108 F. Supp. 798 (S.D.N.Y.), affirmed, 200 F. 2d 666 (C.A. 2), certiorari denied, 345 U.S. 965; *United States* v. *Sobell*, unreported, in S.D.N.Y. and C.A. 2, certiorari denied, 347 U.S. 904; *United States* v. *Sobell*, 142 F. Supp. 515 (S.D.N.Y.) (two motions), affirmed, 244 F. 2d 520 (C.A. 2), certiorari denied, 355 U.S. 873; *United States* v. *Sobell*, 204 F. Supp. 225, affirmed, 314 F. 2d 314, certiorari denied, 374 U.S. 857.

[3] References with the prefix "A." and "G." are to the petitioner's and the government's Appendix in the Court of Appeals, respectively. In the portions of the trial transcript reproduced in the government's Appendix, the number in parentheses designates the page of the printed transcript filed with this Court on June 7, 1952, and the number in brackets, preceded by "fol.", refers to the page on the stenographic transcript.

ation of the merits of the motion. However, the present petition does not raise any issue which has not been raised in prior petitions or which could not have been raised at petitioner's trial. In these circumstances the motion under Section 2255 is inappropriate.

As the district judge noted, despite petitioner's repetitious allegations, his present claims relate to two phases of the government's case at trial (Pet. App. 4a). He claims (1) that by various means the prosecution knowingly created the false impression that Exhibit 8, a sketch made by Greenglass, contained the principles of the atomic bomb dropped at Nagasaki; and (2) that the government knowingly allowed Harry Gold and David Greenglass to testify falsely that they met on June 3, 1945, in Albuquerque, New Mexico, and forged a hotel-registration card to corroborate their testimony in this regard.

At the outset, it should be noted that petitioner's first three § 2255 applications [4] were based on the same primary contention as the present motion—that the government knowingly used perjured testimony to convict petitioner—and in each case the courts unanimously rejected that contention.

The first motion was filed by the Rosenbergs and was adopted by petitioner. In that motion it was contended that Greenglass perjured himself when he testified that he had prepared, from memory alone, GX 2, 6, 7 and 8 (replicas of sketches of atomic-bomb information which Greenglass had delivered to Rosen-

[4] See note 2, *supra*.

berg and Gold). To "demonstrate" the falsity of this testimony, petitioners submitted affidavits of scientists saying it was "impossible" or "improbable" that Greenglass, lacking scientific qualifications, could have prepared these sketches solely from memory.

It was also alleged in that petition that the evidence failed to show that all the information which they conspired to transmit was of such a character as could properly be classified as "secret." 108 F. Supp. at 807. The petition contained the following allegation:

> "It [the petition] will then prove that the secret of the detonating mechanism—allegedly the secret transmitted by David Greenglass to the U.S.S.R.—is no secret at all. At the time of the trial, it was held by the Government and its witness, Walter S. Koski, that the theory of 'implosion' utilized for the purpose of assembling the critical mass of fissionable metal was invented and developed at the Los Alamos Project. The falsity of this statement will be shown by direct reference to the scientific and patent literature available prior to the initiation of the Manhattan Project." [Rosenberg petition, November 24, 1952, at 73–74.]
>
> "* * * The ability of any country to produce an atomic bomb rests upon its ability to mobilize the hundreds of thousands of scientists, technicians and laborers and its ability to make available the vast industrial plant required. It does not rest on stealing the 'secret' of the United States." [*Id.* at 98.]

> "* * * [T]he U.S.S.R. did in fact have the necessary scientists and technology for doing the job and * * * the principal reason that it could not make atom bombs during the course of the war was that all of its available manufacturing facilities were devoted to the more immediate necessity of producing well tested implements of war. It did not need any American 'secrets' to produce a bomb." [*Id.* at 82.]

In addition to a list of various treatises and texts on nuclear physics, this phase of the motion was supported by an affidavit of John Desmond Bernal, professor of physics at Birkbeck College, University of London, and a former Scientific Advisor to the Ministry of Home Security, 1939–1942, and to Combined Operations, 1942–45.

Thus, petitioner's original § 2255 motion contained in substance the same allegations which are made here—that the government falsely represented that the information which had been transmitted was valuable information containing secrets relating to the production of the atomic bomb. While, as the district court noted, petitioner has shifted the emphasis of his attack (Pet. App. 12a), the basic allegations of the alleged fraud are the same. Moreover, the court below correctly concluded that there was nothing in the present motion that could not have been produced at the time of the first motion (Pet. App. 25a–26a). In these circumstances, petitioner was not entitled to relitigate the same contentions in a new § 2255 proceeding. *Sanders* v. *United States,* 373 U.S. 1, 15–19.

Similarly, there is nothing new contained in the instant motion that would justify the present belated attack on the credulity of Gold and Greenglass concerning their meeting in June 1945, or the authenticity of the hotel registration. Here, it is significant that, at trial, defense counsel not only decided not to cross-examine Gold but that in summation the Rosenbergs' attorney said of Gold, "[H]e told the truth. That is why I didn't cross-examine him" (G. 199a). And petitioner's counsel, adopting a similar strategy, did not even refer to Gold in his summation. Petitioner's conclusory allegations of perjury do not change the fact that the substance of his argument is that there are alleged inconsistencies between certain pre-trial statements of Gold and his trial testimony. However, petitioner's trial counsel made a deliberate choice not to cross-examine Gold and not to seek to obtain any pre-trial statement of Gold.[5] Similarly, the defects in Exhibit 16 which petitioner now relies on to show forgery appear on the face of the document which was introduced into evidence without objection. Thus, the present petition does no more than attempt to litigate issues which petitioner's trial counsel chose not to raise. It seems clear that petitioner "cannot now by way of motion under § 2255 assert a defense * * * which was available but not presented at the trial." *United States* v. *Branch,* 261 F. 2d 530, 533 (C.A. 2), certiorari denied, 359 U.S. 993.

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[5] As the court below noted, trial counsel were able to obtain F.B.I. statements and grand-jury testimony during the cross-examination of Max Elitcher (Pet. App. 42a–43a).

THE DISTRICT COURT CORRECTLY DETERMINED THAT THE FILES AND RECORDS OF THE CASE SHOW THAT PETITIONER'S ALLEGATIONS OF PERJURY AND FRAUD ARE WITHOUT SUBSTANCE

In his opinion denying petitioner's motion, Judge Weinfeld stated that he had "read the entire lengthy trial transcript, including the testimony of witnesses who are not impugned; also the various post-trial petitions by petitioner and those of his codefendants in which he joined, and the trial and appellate records of those proceedings" (Pet. App. 3a). In a detailed opinion Judge Weinfeld carefully analyzed the allegations of the petition and demonstrated that, when viewed in light of the record of the trial, the petition is without merit. He concluded that petitioner "has failed to sustain his charges; that the files and records of the case conclusively show that he is not entitled to relief, and that no act or conduct on the part of the government deprived him of a fundamentally fair trial" (Pet. App. 45a–46a).

As noted above, petitioner's contentions relate to the government's evidence bearing on two aspects of the case—(1) the secrecy and importance of the atomic information, and (2) the meeting of Gold and Greenglass in Albuquerque in June 1945.

Petitioner contends that David Greenglass and John A. Derry committed perjury in testimony concerning their own qualifications and the accuracy of a sketch relating to the atom bomb, Government Exhibit 8, which Greenglass identified as being similar to a sketch he had given Rosenberg. In connection with

this allegation, it is important to note that petitioner and his co-defendants were charged with conspiring to deliver information relating to the national defense to the Soviet Union. Thus, even if the information which Greenglass delivered to Rosenberg was not accurate, the charge that they were engaged in a conspiracy to obtain information about the atomic bomb would stand. Moreover, as Judge Weinfeld's opinion shows, the affidavits submitted in support of the motion failed to establish that Greenglass and Derry committed perjury (Pet. App. 11a–26a).

Greenglass testified that he had not obtained a college degree in science or engineering and was "no scientific expert" (G. 118a). Moreover, in testifying about a meeting that Rosenberg had arranged for him with a Russian, at which he was questioned about the lens molds for the atomic bomb that he was working on at his machine shop in Los Alamos, Greenglass admitted that "the things he [the Russian] wanted to know, I had no direct knowledge of and I couldn't give a positive answer" (G. 45a–46a).

With regard to Exhibit 8, Greenglass testified that in January 1945 Rosenberg had given him a description of the atom bomb which he later discovered was the type dropped on Hiroshima and that he thereafter attempted to gather information concerning the bomb (G. 82a, 85a, 86a). In September 1945 he returned to New York and told Rosenberg "I think I have * * * a pretty good description of the atom bomb." Greenglass testified that this bomb was one that was developed after the Hiroshima bomb and that he had

given Rosenberg 12 pages of materials relating to the bomb, including a sketch. Government Exhibit 8 was a sketch that Greenglass prepared prior to the trial which was, except for "a little difference in size," the same as the sketch he gave Rosenberg in September 1945 (G. 82a–91a).[6]

The government next called John A. Derry, who testified that he had a B.S. degree in electrical engineering and that during the period in question he had served as a liaison officer between the Los Alamos laboratory and General Groves, who was in charge of the entire Manhatten Project. It was his job to keep General Groves informed of the technical progress on the research, development and production phases of the atomc bomb project at Los Alamos and it was his "job to know what went into the parts" of the bomb (G. 184a–191a). Referring to Greenglass's testimony concerning the information and sketch he gave Rosenberg, Derry stated that they "demonstrate substantially and with substantial accuracy the principle involved in the operation of the 1945 atomic bomb" (G. 190a–192a). In response to a question whether the information "concerne[d] a type of atomic bomb which was actually used," Derry replied, "It does. It is the bomb we dropped at Nagasaki, similar to it" (G. 193a). During Derry's cross-examination it was conceded by the government that the information sup-

[6] While petitioner's present counsel allege that the government went to great lengths to convey the impression that this sketch was highly secret, it was defense counsel who suggested that the sketch and testimony relating to it should be kept secret (G. 91a–97a).

plied by Greenglass was not a complete and detailed description of the bomb and only set forth the principle involved in its construction (G. 196a–198a).

Viewed in the light of the evidence concerning Exhibit 8 actually introduced at trial, there is clearly no merit to petitioner's contention that the prosecution deliberately misled the jury as to the importance or accuracy of the atomic information which Greenglass delivered to Rosenberg. Moreover, the affidavits of the scientists submitted in support of the petition, far from showing that Derry committed perjury, tend to support his testimony. Thus, one may compare to Derry's testimony that the sketch and description "demonstrate substantially and with substantial accuracy the principle involved in the operation of the 1945 atomic bomb" (G. 191a–192a), the following statements in the affidavits:

> "* * * the description is correct in its most vague and general aspects, that explosive 'lenses' were used to achieve implosion of a core containing plutonium and beryllium components, the overall system being arranged in an essentially spherically symmetrical confirguration * * * " (Linschitz, A. 317a);
>
> "* * * the sketch contained in Government Exhibit 8 illustrates the general points; the use of explosive lenses to make spherical implosion; the use of electrical detonation for simultaneity; the use of a plutonium sphere, and the use of beryllium as one component * * *" (Morrison, A. 342a);
>
> "* * * The sketch of Exhibit 8 * * * is a somewhat schematized cross-section [of an im-

> plosion bomb], which might be called a pedagogical descriptive picture * * *" (Morris, A. 347a); and
>
> "* * * The sketch presented is the kind of diagram I would use to explain the ideas involved in the bomb * * *" (Christy, A. 424a).

Moreover, the fact that these scientists may disagree with some of Derry's statements does not establish that the government knowingly used false testimony. As Judge Weinfeld noted (Pet. App. 15a):

> * * * The fact that they disagree with Derry's opinion does not establish its falsity. Significantly, one of the scientists concedes that judgment on the matter "must be a highly subjective one indeed." Derry's credibility was for the jury and not a panel of experts, who sixteen years after the event seek to undermine it. * * *

Similarly, the affidavits submitted in support of petitioner's motion fail to make a prima facie showing that the government used perjured testimony and a forged document to establish that Harry Gold met David Greenglass in Albuquerque, New Mexico, in June 1945. Here, again, it is important to note that it was the defense strategy not to cross-examine Gold at the trial.

To establish that Gold perjured himself at trial and that the government knew of this perjury, petitioner relies on the transcripts of interviews between Gold and his attorney in June 1954. These, petitioner alleges, are so inconsistent with Gold's trial testimony that the only conclusion that may be drawn from

them is that the prosecution and Gold concocted the trial testimony. However, as Judge Weinfeld concluded:

> A careful reading of the transcripts of the recordings and all other material, rather than supporting petitioner's charges, strongly corroborates Gold's trial testimony. The substance of Gold's statement to his lawyer on June 14, one day before [Greenglass's] arrest, is essentially the substance of his trial testimony; the major events, times, places and persons correspond. * * * The omissions and the claimed contradiction do not undermine the fabric of essential matters. * * * [264 F. Supp. at 601.]

Thus a reading of the record shows that on June 14, 1950, Gold pinpointed the very date of his Greenglass meetings five years earlier; and he relates times, places and conversations with substantial accuracy. The most striking feature of Gold's June 14, 1950, interview is not the omissions pointed out by petitioner, but the substantial completeness of Gold's account less than a month after his arrest and only two weeks after he first disclosed this incident to F.B.I. agents. This is particularly significant because Gold's disclosure to his attorneys of the circumstances of the June 3, 1945, meetings preceded by a day the arrest and interview of David Greenglass. In these circumstances, it is difficult to see how appellant can find in the Gold interviews any support for his claim that the June 3 meetings never took place.

While Gold's statement to his attorneys may omit several details found in his trial testimony, it is important to note that Gold himself has stated that his crime had been

> told with the most meticulous thoroughness to the FBI and, in somewhat less exhaustive detail, to my counsel. (Senate Internal Security Hearings on the Scope of Soviet Activity in the United States, 84th Cong., 2d Sess., Part 20, p. 1058 at 1087 (April 26, 1956), filed with court below October 13, 1966.)[7]

Moreover, the omissions in the statements are largely explained in the very statements themselves. While Gold, on June 14, 1950, did not state Greenglass's name and address and only referred to the "GI and his wife," the recording of that interview shows he was able through his description to direct the F.B.I. to the very house in Albuquerque where he met Greenglass, even though that house had been physically altered after 1945 (G. 225a–226a), and that he was able to identify Greenglass as the GI even though Greenglass had gained considerable weight since 1945 (G. 226a). While Gold also was unable on June 14 to remember the exact recognition sign "I come from Julius," he did remember that a sign involving the name of a man was used (G. 224a). While Gold did not mention staying at the Hilton in his June 14,

[7] The full circumstances surrounding Gold's interviews with his attorney are set forth in the district court's opinion (Pet. App. 35a–39a).

1950, interview, he did say in that very statement that in trying to locate the Greenglass apartment for the F.B.I. he had looked at films "starting with the Hilton Hotel" (G. 226a). And although he did not mention being given the phone number of Greenglass's brother-in-law Julius, he did state that he had been given the name and address, or name and phone number of the GI's "father-in-law or possibly an uncle of his who lived somewhere in the Bronx of New York" (G. 224a).

There is similarly no merit in petitioner's contention that the government knowingly used a forged registration card to corroborate Gold's testimony. In this regard petitioner relies on the following: (1) the card bears on the front the handwritten date of June 3, but on the back is stamped "June 4, 1945"; (2) there are erasures on the front of the card; and (3) the initials "ak" appearing on the June card were written by someone other than the person who wrote "ak" on Gold's registration card for September 19, 1945. Once again it is important to note that these alleged defects appear on the face of the exhibit and that trial counsel made no objection to its admission.[8] Moreover, as Judge Weinfeld noted in rejecting the contention (Pet. App. 31a–32a):

> * * * The circumstance that at a public and busy hotel the same initials appear on the two

[8] It is also significant that this exhibit was not introduced until after defense counsel had made their decision not to cross-examine Gold.

cards and they and the data as to rate, stay, departure and room number are in different handwriting does not, in one fell swoop, permit the inference that it was "forged"; that the government knew it was forged or contrived its forgery; that Gold did not register at the Hotel Hilton on June 3; that he committed perjury as to meetings that day with the Greenglasses; that David Greenglass and his wife committed perjury in so testifying; that the prosecutor perpetrated a fraud when he stated a witness was on his way with the original to testify that it was kept in the regular and usual course of business; that a grand fraud had been perpetrated by the Federal Bureau of Investigation, the United States Attorney and government witnesses to establish falsely that meetings occurred on June 3 between Gold and the Greenglasses at Albuquerque so as to give credence to Gold's testimony that the day before he had met and received from Klaus Fuchs classified material in order thereby to tax petitioner and his codefendants with the well-publicized activities of Fuchs in the Soviet spy system.

The entire theory of a grand conspiracy is the product of a fertile imagination. The unrestrained hurling of invective, page after page, in the petition does not obscure the lack of evidence. A constant drumfire of vituperation does not establish basic facts which are required before inferences may reasonably be drawn to support charges of fraud and perjury.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1968